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No. 91-1244

In The

Supreme Court of the United States

October Term, 1991

HYPOINT TECHNOLOGY, INC.,

Petitioner,

vs.

HEWLETT-PACKARD COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Contrary to Hewlett-Packard's ("HP") assertions, a decision by this Court would not only affect the litigants in this case. This case presents questions of importance to the national economy. The Sixth Circuit holds that no intermediate participant in a service market can *ever* incur antitrust injury when its source of supply is eliminated by a monopolist provider – even where, as here, the intermediate repackages or otherwise alters the service in a way that benefits consumers and that consumers do not otherwise obtain. That ruling has far-reaching adverse

implications in a major portion of the economy, and it warrants review by this Court.

HP's Brief In Opposition reads like a cross petition for Supreme Court review. It argues that HP did nothing wrong, and even if it did, no one other than HyPoint was injured by its conduct. That is irrelevant, as well as wrong. The issue presented here is whether HyPoint has standing to claim the recovery to which the jury found it entitled. What is relevant is that, contrary to HP's assertions, (1) a conflict exists among the circuits on the issue of antitrust standing for service intermediaries, and (2) this question is significant and will, as the importance of service markets increases, recur until resolved.

The decision of the Court of Appeals conflicts directly with the decision of the Ninth Circuit in *Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 951 F.2d 1158 (9th Cir. 1991).[1] HP's attempt to distinguish *Yellow Pages* from *HyPoint* on the basis of HyPoint's alleged inability to discipline HP's prices and benefit consumers is simply wrong.

The record shows that HP's profit margins on its full service computer maintenance contract were as much as 800 percent. Joint App. at 216-18. By repackaging HP's guaranteed four-hour time and materials service calls

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[1] In fact, HyPoint has been advised by counsel for GTE Directories Corp. that GTE plans to petition this Court for certiorari arguing, as does HyPoint, that there is a direct conflict between the circuits.

within the framework of a HyPoint guaranteed full service contract, users of HP computers received the advantage of a full service contract at a price 20 to 30 percent less than HP's contract price. Once HP had driven HyPoint from the market it did not have to reduce its contract price to meet HyPoint's. *Id.* at 229. This caused direct consumer injury to users of HP computers.

The jury found that HyPoint *had* disciplined the prices HP was able to charge its service contract customers. HyPoint directly limited the price that HP could charge for its service contracts. Indeed, HP expressly recognized HyPoint's disciplining function when HP itself characterized HyPoint as a "competitor" in the HP service market. *See, e.g.*, Joint App. at 643; 657-58. The Sixth Circuit ignored this evidence of HyPoint's ability to discipline HP's *maintenance contract prices* when it erroneously concluded that "HyPoint had no potential to make . . . [HP] more efficient. . . . "[2]

For apparently no reason, the Sixth Circuit assumed that only competition from independent service organizations ("ISOs") could make HP more efficient. HP admitted, and the jury found, that HP was not disciplined by ISOs either before or after HyPoint exited the market because HP's policy change did not cause it to lose *any* "systems business" to ISOs. Plaintiff's Exhibit 78, Joint App. at 675-76. However, that does not prove that consumers were not injured by HyPoint's exit.

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[2] The Sixth Circuit focused its attention on the wrong price. It only considered whether HyPoint could discipline HP's *"time and materials"* price which is irrelevant and was not part of HyPoint's case.

HP further attempts to distinguish *Yellow Pages* from *HyPoint* on the basis that *Yellow Pages* was merely an appeal from Summary Judgment. Br. Opp. at 14. This fact puts the Sixth Circuit's dismissal of standing *more* in conflict with the reasoning of the Ninth Circuit. The Ninth Circuit recognized the possible existence of antitrust standing in *Yellow Pages*, and therefore remanded the case for further proceedings. The Sixth Circuit, by contrast, overturned the jury's findings which supported HyPoint's standing. The conflict is clear and direct.

Nor is the Ninth Circuit's reasoning in *Yellow Pages* unique among the circuits as HP suggests. Br. Opp. at 17 n.13. The Fifth Circuit has taken a similar approach. In *Almeda Mall v. Houston Lighting & Power*, 615 F.2d 343 (5th Cir.), *cert. denied*, 449 U.S. 870 (1980), a mall owner wanted to buy all of the electricity required by its tenants from the local power company. It planned to resell this power *at the same price* the power company was offering to each tenant individually. In denying standing to the mall owner, the Fifth Circuit highlighted the fact that the mall owner was not providing any competitive benefits to the tenants by replacing the power company.

The Fifth Circuit specifically distinguished between a person who purchases from a power company to resell power at a *lower* competitive retail rate (to other customers throughout a broader market), and the mall owner who was not prepared to offer retail power to retail customers outside its mall, let alone at a better price to its tenants. *Almeda Mall*, 615 F.2d at 353. The implication is that if the mall owner had acted as a lower cost service repackager, or as a substitute supplier of a different and

better service like HyPoint here, it would have had antitrust standing. The Sixth Circuit believed that its ruling in this case was consistent with *Almeda Mall*. However, the Sixth Circuit failed to recognize what the jury saw, that driving HyPoint out of business enabled HP to extract monopoly profits through its service contracts.

This Court has never addressed the precise standing issue presented in this case. However, the Sixth Circuit's reasoning behind its novel holding that a reseller in HyPoint's position can *never* allege antitrust injury is inconsistent with this Court's concerns in other antitrust decisions. In *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 375 (1927), for example, this Court unanimously upheld a damage award to a photo equipment stock house whose injury was attributable to Kodak's refusal to sell to it at "dealer discounts." Eradication of a middleman, such as HyPoint or a photo stock house that sells at a discount, and whose presence in the market lowers consumer prices, is exactly the harm addressed by the *Kodak* Court. This Court recognized that putting such a discounter out of business directly injures consumer welfare.[3]

Similarly, HyPoint stands in the same position as Aspen Highlands in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). It is true that the plaintiff in *Aspen Skiing* did not *merely* provide access to defendant's resort facilities. *See* Br. Opp. at 22-23 n.18. However, that was an important part of the service repackage

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[3] The *Kodak* case is still cited with approval by this Court. *See Texaco Inc. v. Hasbrouck*, 110 S. Ct. 2535, 2552 n.3 (1990).

that Aspen Highlands provided its customers. It is highly unlikely that if the respondent in *Aspen* had challenged Aspen's standing to bring its case, standing would not have been found. If consumer welfare is the goal of the antitrust laws, there is no sound reason for denying antitrust standing to companies like HyPoint.

Though it is the first, this will not be the last time this Court has to consider whether market clearing intermediaries have standing to sue a monopolist provider of parts and service. The Sixth Circuit has announced a rule which denies antitrust standing to a growing number of service intermediaries, be they called middlemen, repackagers, brokers, discounters, insurers or arbitragers. These intermediaries provide the very clearing function which assures market efficiency. More than 60 percent of the U.S. gross national product is generated in service rather than product markets. Donald F. Blumberg, *Managing Service as a Strategic Profit Center*, 33-38 (1991).

Market clearing intermediaries in service markets should be encouraged to bring antitrust cases against monopolists whose conduct impairs consumer welfare. Otherwise we discourage the arbitrage function. As one Nobel laureate economist has noted, a prejudice that arbitragers are not respectable because they do not create goods or provide nonmonetary services is "not just silly, but destructive." Harry M. Markowitz, *Markets and Morality: Or Arbitragers Get No Respect*, Wall St. J., May 14, 1991, at A22.

Because the question presented here is one on which the circuits are divided, and because, with the increasing

importance of service markets in our economy, this question will increasingly recur, this case is ripe for Supreme Court review.

CONCLUSION

For the foregoing reasons, HyPoint's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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